U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 24 January 2006

Case No.: 2005-LDA-32

OWCP No.: 02-138485

IN THE MATTER OF

VERNON PATTON,
Claimant

vs.

BROWN & ROOT SERVICES,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier

APPEARANCES:

WILLIAM HALLER, ESQ.,
On Behalf of the Claimant

RICHARD GARELICK, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., as extended by the Defense Base Act, 42 U.S.C. §1651, et seq. The claim is brought by Vernon M. Patton,

"Claimant," against Service Employees International, Inc., "Employer," and The Insurance Company of Pennsylvania ("AIG"), "Carrier." Claimant sustained injury on August 30, 2004 as a result of a vehicular accident during his employment with Employer in Iraq. A hearing was held on November 16, 2005 in Amarillo, Texas, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1; and

2) Respondent's Exhibits Nos. 1-14; and

3) Claimant's Exhibits Nos. 1-10.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.[1]

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue. The parties are subject to the Longshore and Harbor Workers' Compensation Act, as extended by the Defense Base Act, by virtue of the fact that at the time of the injury Claimant was working under a Defense Base Act contract in Iraq.

2) The date of Claimant's injury is August 30, 2004.

3) Claimant's injury arose in the course and scope of employment.

4) An employer/employee relationship existed at the time of injury.

5) Employer was advised of or learned of the injury on August 30, 2004.

6) Claimant timely filed a claim for compensation.

7) Employer filed a Notice of Controversion on August 24, 2005.

8) An Informal Conference was held on January 13, 2005.

[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.
[2] JX-1.

9) The parties are in dispute as to Claimant's average weekly wage at the time of the injury.

10) Claimant was paid compensation at the rate of $800.00 per week for the 49 week period from September 11, 2004 through August 19, 2005 for a total paid in the amount of $39,200.00. Claimant was also provided certain medical benefits under this claim.

11) The claim is limited to temporary total disability benefits and permanent disability is not now in issue (Claimant also claims that he is entitled to ongoing Section 7 medical benefits). Thus, the Court is not being asked to decide whether Claimant is at maximum medical improvement relative to the August 30, 2004 injury.

ISSUES

The unresolved issues in these proceedings are:

(1) Causation entitling Claimant to ongoing temporary total disability benefits; and

(2) Section 7 Medical Benefits; and

(3) Average Weekly Wage.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Vernon Patton

Vernon Patton is thirty-five years old and resides in Headley, Texas. He possesses a GED and completed trade school in diesel mechanics. TR 20-21. His work history includes mechanics, road construction, heavy equipment operation, and haul truck driving. TR 22-23, 90-94; RX-11. In 2001, he purchased his own tractor-trailer grain truck and began hauling for his own profit. TR 24-25. In May 2004, Patton decided to go to Iraq, because his profits were suffering due to the rising cost of fuel. TR 26. He obtained a job with Kellog, Brown and Root ("KBR") in Iraq through a recruiter. TR 28. He underwent orientation in Houston, Texas and was found physically fit to perform the job. TR 30. His application reflected that he was in a car accident in 1997. At the hearing, he explained that he was rear-ended while sitting at a stoplight and was subsequently treated by a chiropractor for his back for one month. TR 27, 31.

On May 25, 2004, Patton signed a written contract that set forth the terms of his employment. TR 31; CX-7. His job title was "heavy truck driver." TR 33. On May 26, 2004, he flew to Iraq and was put on the payroll of Employer. TR 33. He was stationed at a military base called Camp Anaconda, near Balad, Iraq. TR 34. He drove a refrigerated truck and delivered ice to outlying bases and was also chosen for convoy driving to haul ice from Kuwait back to the base. TR 33-35. He testified that he engaged in manual labor when moving pallets of ice with an un-motorized pallet jack down the ramp into another trailer. TR 35-36. When the pallets were not intact, he would lift individual bags of ice. TR 37. Patton testified that anytime he made a run of ice outside the base, military escort accompanied him. TR 37-38. Patton testified that he wore a Kevlar helmet and vest as protective equipment to guard against bullets and shrapnel. TR 41. He testified that there was an instance of a direct attack on his truck, when a boy threw an explosive into the median of the road, leaving two large dents in his door. TR 41. Patton also described seeing tracers on his windshield and misaimed bullets pass directly in front of his truck. TR 41-42. Patton testified that his schedule was 12-hour shifts, seven days per week, but shifts typically ran longer. TR 38. He testified that he worked at least 84 hours per week, and never took a day off. TR 40.

Patton was injured on August 30, 2004. On this date, he drove a bobtail tractor, without a trailer, in a daytime convoy. TR 43. The convoy was headed to Camp Taji, which was about 20 miles south of Camp Anaconda. TR 45. He was the last civilian truck in the convoy and was followed by military trucks. TR 43-46. Patton testified that convoy speed ranged from 50 to 60 miles per hour. TR 47. At the time of the accident, the convoy was traveling southbound on a large highway, called Tampa, approaching Camp Taji. They approached an off-ramp bridging over the highway that was considered a "kill zone," an area commonly subject to attacks. TR 48-49. As the convoy approached the off-ramp, the military shut it down, and the first truck in the convoy stopped. TR 49. The trucks in front rear-ended each other in chain reaction. Patton testified that he was able to stop his truck three or four feet short of the truck in front of him, sliding 8 to 20 feet before stopping. TR 50. Approximately one second after he stopped, he was hit from behind, and his truck was thrown into the truck in front of him. TR 50. Patton testified that he was knocked unconscious for approximately 30 seconds, possibly longer. He described that when he woke up, his passenger was trying to wake him and the military driver was beating on his door. TR 51. Patton recalled that he was dazed and unsure what had happened and that he had a cut on his forehead from his helmet. TR 52. He was wearing a lap and shoulder harness seatbelt at the time of the collision. TR 111.

After 20 or 30 minutes, they arrived at Camp Taji and he asked to go to the field hospital. TR 52-53. He was told to go back to his base, because the field hospital was full. TR 54. He testified that he did not have any back pain at first and that he experienced sharp pain in his left knee after an hour or so. TR 52. His truck was operable, but had broken taillights, a broken fiberglass guard on the front bumper, and

bent-in taillight hanger pipes. TR 55. He had a digital camera with him and took photos of his truck and the one that hit him while they were at Camp Taji. TR 56-57, 64. The photos show that the front fiberglass bumper was broken from one side to the other, that the taillights were knocked out, that the pintle chain was broken, and that the pipes holding the taillights were bent. One photo shows that the front bumper of the Army truck was bent in the center. CX-4.

Upon his return to Camp Anaconda, Patton received immediate medical attention at the medic office. TR 64. He was given ibuprofen and an ACE bandage for his knee and was restricted from strenuous work. TR 65-66; CX-5, p. 1. He returned to the medic office the following three days for follow-up exams. TR 66; CX-5, p. 2-5. Patton recalled that for the first day or so, he had pain in his left knee, lower back and neck. He was on light duty during the remainder of his time in Iraq and was told to rest and heal. His foreman restricted him from driving the truck. TR 67.

Patton was referred to Dr. Hall at the military hospital. Dr. Hall prescribed Flexeril and restricted him to light duty work. TR 68; CX-5, p. 4. The medic then suggested that Patton take sick leave and go back to the U.S. for treatment. TR 68. He was placed on medical leave on September 9, 2004. He was given permission to fly out of Camp Anaconda without his helmet and PPD gear due to the fact that their weight could affect his condition. TR 69-70; CX-5, p. 6. He flew out of Iraq on September 11, 2004 and arrived in the U.S. on September 13, 2004. TR 68-70. He ceased working for Employer at this time. TR 70.

Patton testified that when he arrived in Texas, he was experiencing unbearable lower back pain, ringing in his ears, and minimal left knee pain. TR 72. He first saw Dr. Howard, a general practitioner in Clarendon, Texas. He visited him five or six times. TR 73. Patton recalled that Dr. Howard told him he had strained a ligament in his back, which would heal with time. TR 73. Dr. Howard prescribed medications and sent him to physical therapy for four to five weeks. TR 74; CX-5, p. 15-34. Patton testified that physical therapy helped for a short period of time. TR 74. During his last visit, Dr. Howard told him that he could not find anything wrong and that he would likely continue to hurt. He ordered an MRI to set Patton's mind at ease. TR 74. Patton underwent the MRI on November 5, 2004. CX-5, p. 35-36. Patton testified that Dr. Howard opined that he had degenerative disc disease, that it was present before the accident, and that it should not cause pain. TR 75. Dr. Howard then referred him to Dr. Piskun, a spinal surgeon. TR 75-76; CX-5, p. 38.

Patton first saw Dr. Piskun on November 22, 2004. TR 76, CX-5, p. 40-41. He prescribed an anti-inflammatory medication and referred him to a pain specialist, Dr. Ice. TR 76-77. He saw Dr. Ice on January 31, 2005 and continues to receive treatment from him. CX-5, p. 43. Patton testified that Dr. Ice prescribed him pain medications, which changed each visit. TR 77. He stated that none of the medications have eliminated his

pain altogether; his pain is eased, but he is discomforted. TR 78. Patton is presently taking morphine, which he finds helpful. TR 78.

Patton testified that Dr. Piskun recommended an operation to fuse two vertebrae, but he has not yet received the operation due to lack of funding. TR 78-79. Patton also received two spinal epidurals at Dr. Piskun's recommendation, but did not find them helpful. TR 79. Patton also testified that he tried to lose weight and tried to stay physically active, but his condition was not alleviated. TR 80. Dr. Piskun also prescribed a body brace to be worn for approximately eight weeks. However, Carrier did not grant this request. TR 80. Patton testified that Carrier never paid for any of his prescriptions. TR 81.

Patton testified that he saw Dr. Schneider regarding the ringing in his ears, and Dr. Schneider told him that he had 20 percent hearing loss and probably had a condition called tinnitus. TR 81-82. Patton testified that he can no longer see Dr. Schneider because he does not have insurance and cannot afford to pay for the visits. TR 82. He testified that he never experienced ringing in his ears prior to his accident in Iraq. TR 82.

Patton described that on a daily basis he experiences strong back pain in the morning. He takes a dose of morphine, which somewhat eases the pain in the morning hours. The pain then progresses until he has to take another dose of morphine. He experiences ringing in his ears and headaches. TR 82. He also experiences depression. TR 83. Patton drives his car locally and has partially driven the 73 miles between Hedley and Amarillo; however, he gets uncomfortable and drowsy and he has to ask his wife to finish the drive. TR 84. He has difficulty sitting in small, uncomfortable chairs. TR 84. He testified that he cannot drive a truck due to his pain medications and noted that it would be illegal to do so. TR 85. He does not feel he would be physically capable of driving a truck for a long distance. TR 85-86. Patton still owns his grain truck. He testified that he attempted driving it in December 2004 before he was on narcotic medication. However, he drove it eight miles and experienced pain. TR 86. Patton testified that prior to his accident in Iraq, he did not experience any problems with his back. TR 42.

Patton testified that if his physical condition allowed, he would like to return to his work as a truck driver in Iraq. TR 88. Patton testified that everyone who worked for KBR had one-year contracts, and he knew of drivers who renewed their contracts beyond one year. TR 88-89. He intended to work the full year and renew his contract if the job was still available. TR 89. He knew that KBR had a nine-year contract with the government, and he would have happily worked there for at least four to five years. TR 89, 107.

AIG ceased making payments to him in August 2005, including medicals. He is on Medicaid and receives $500 a month in food stamps and $200 a month from the TANF program. He is the primary source of income for his family. TR 87. Patton's last pay stub from Employer reflects year-to-date earnings of $27,881 while working for Employer in Iraq from May 26, 2004 through September 11, 2004. TR 71-72; CX-6. As a trucker, his gross profits were $88,000 one year and $87,000 another. TR 96.

II. MEDICAL EVIDENCE: Depositions and Records

Walter Piskun, M.D.

Dr. Piskun is a board-certified neurosurgeon and began treating Patton on November 22, 2004. CX-9, p. 7; CX-5, p. 40-41. Dr. Piskun formally diagnosed Patton with chronic intractable low back pain secondary to degenerative disc disease and spondylosthesis. CX-9, p. 20-21. Dr. Piskun testified that Patton's MRI reflected that he had Grade 1 spondylosthesis at L5-S1 and a broad-based central disc herniation at L5-S1 in direct contact with the dural sac. He also found narrowing of the left L5-S1 neuroforamina, the opening through which the nerve passes, and bulging of the central disc to the right side. CX-9, p. 8. Dr. Piskun testified that Patton's condition is consistent with his complaints of pain. CX-9, p. 10. He testified that there is a possibility that Patton had the spondylosthesis before his accident, because five to fifteen percent of people are born with it, but most likely, the injury from the accident worsened the condition and caused an onset of pain. CX-9, p. 10. Dr. Piskun believes that Patton's pathology in his back was at least aggravated by the motor vehicle accident in Iraq. CX-9, p. 10. He rationalized that Patton took a fairly severe blow and experienced flexion forward, evidenced by the laceration on his forehead. CX-9, p. 18-20. He testified that Patton is disabled from being a truck driver because he has difficulty sitting due to his severe pain. CX-9, p. 11.

Dr. Piskun's records reflect that he recommended epidural steroid injections, referred Patton to a physiatrist, and recommended a back brace. CX-5, p. 41. After several months of treatment by physiatrist, Dr. Ice, Dr. Piskun noted that the conservative therapy was not successful and recommended surgery. CX-5, p. 53. Dr. Piskun testified that surgery could significantly reduce Patton's pain. He recommended posterior lateral interbody fusion, posterior lateral instrumentation at L5-S1, and anterior lumbar interbody fusion with a posterior stabilization. CX-9, p. 12.

Dr. Piskun did not agree with Dr. McCaskell's opinion that there were no objective findings consistent with Patton's chronic pain. He cited structural abnormalities on the MRI scan, which have been treated for over one year without improvement. Dr. Piskun testified that during his physical examination, Patton complained of back pain when he bent over and was unable to touch his toes. CX-9, p.

25-26. Dr. Piskun admitted that weight loss would help ease Patton's pain; however, he believed asking Patton to lose weight would not be successful. CX-9, p. 32. Dr. Piskun admitted that it is possible for a person with Patton's MRI to not be functionally impaired and to not have experienced a traumatic injury, but he did not believe this to be the case for Patton. CX-9, p. 22.

Bernie L. McCaskill, M.D.

Dr. McCaskill is a board-certified orthopedic surgeon. RX-14, p. 4. Dr. McCaskill examined Patton on July 12, 2005 at Employer's request. RX-14, p. 5. He issued a report based on the examination and a review of Patton's medical records. RX-14, p. 5. The physical examination included direct visual inspection, range of motion exercises, and review of the MRI. Dr. McCaskill opined that Patton's presentation and physical movements were inconsistent with a severe injury. RX-14, p. 8. He testified that the neurological examination revealed that Patton did not have any weakness or reflex changes consistent with pressure on the nerves in his back. RX-14, p. 10. Dr. McCaskill interpreted the MRI to demonstrate degenerative changes of the lower disc in the lumbar spine and opined that this was common in many people Patton's age. RX-14, p. 13. He testified that the central herniated disc at L5-S1 was not causing pressure on the nerves. RX-14, p. 14. He diagnosed Patton with "spondylogenic lumbosacral spine pain, chronic, anatomic etiology undetermined by history." RX-5. His appraisal was that Patton had lower back pain consistent with pain due to injury of the ligaments and joints as opposed to a neurological injury. RX-14, p. 14; RX-5. Dr. McCaskill opined that at the time of his evaluation, he did not see any objective evidence that Patton was unable to return to his regular work. RX-14, p. 15. Dr. McCaskill believed that further supervised medical treatment would not be of benefit. He recommended discontinuing prescriptions of Neurontin or OxyContin and prescribing a muscle relaxant and non-narcotic pain medication. RX-14, p. 15-16. He opined that surgery would not predictably help Patton. RX-14, p. 16. RX-5. Dr. McCaskill did not believe that the accident could have resulted in any significant type of lower back injury. RX-5. He explained that he believed this because Patton did not experience compression or rotation, but only flexion and extension. RX-14, p. 24-25.

III. OTHER EVIDENCE: Depositions and Records

Louis Rigby

Louis Rigby is KBR's human resources manager for the Houston support office. CX-8, p. 5. Rigby explained that Patton's contract specified a $2,700 per month base salary with a straight overtime basis. It included a foreign service bonus of five percent, an area differential of 25 percent and danger pay of 25 percent, each based on the base salary of $2,700 per month. TR 34-35. Rigby testified that there were 213 heavy duty truck drivers that actually worked 12 months or longer. TR 36. These men were

expected to work seven days per week, 12 hours per day. TR 37. However, there were days when the truck drivers worked less than 12 hours and days when the truck drivers worked longer than 12 hours. TR 38.

Tax Returns

Patton's 2004 tax return, Schedule C, reflects $23,927.00 in gross receipts from his wife's fruit stand and $35,577 in other income from his trucking business, trailer lease and auto sales. RX-7, p. 174; RX-8. His trucking business had expenses in the amount of $29,052. RX-7, p. 175. Patton's 2003 tax return, Schedule C, reflects $69,691 in income from his trucking business and expenses of $55,581. RX-6, p. 160-170.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to the Longshore Harbor Workers' Compensation Act, as extended by the Defense Base Act. 42 U.S.C. § 1651. The LHWCA applies "in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work." 42 U.S.C. § 1651.

In this case, the parties do not contest jurisdiction under the Defense Base Act. At the time of his injury, Claimant was employed by Employer under a United States Department of Defense contract in Iraq. TR 60. Therefore, the Court finds that jurisdiction is proper under the Defense Base Act.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a prima facie case of compensability. He must demonstrate that he sustained physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318 (1982). Once the claimant establishes these two elements of his *prima facie* case, Section 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). After the Section 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vicchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

The parties stipulate that Claimant sustained injury in the course and scope of his employment with Employer. JX-1. The record establishes that Claimant was involved in a motor vehicle accident in Iraq and was subsequently treated at the military's medic station and hospital for injuries including low back pain. Therefore, Claimant has established a *prima facie* case and is entitled to the §20(a) presumption. Employer argues, however, that Claimant's present condition was not caused by the accident, but by natural degenerative changes in his spine. Employer offers the opinion of Dr. McCaskill, who testified that he found no objective evidence consistent with Claimant's complaints and attributed the degenerative disc condition evident in Claimant's MRI to age. Dr. McCaskill went on to opine that, based on Claimant's description of the accident; the accident could not have caused any significant type of lower back injury. The Court finds that Dr. McCaskill's expert testimony on this matter is sufficient to rebut the presumption and shall proceed to resolve the issue of causation based on the evidence as a whole.

Claimant offers the testimony of his treating neurosurgeon, Dr. Piskun, who opined that the accident was severe enough to flex Claimant forward, while restrained, to the extent that he sustained a cut to his forehead and was knocked unconscious. While he admitted that it was possible that Claimant had degenerative disc disease prior to the

accident, Dr. Piskun opined that it was at least aggravated by the accident based on the fact that Claimant's complaints of pain arose only after the accident. CX-9, p. 10. He found Claimant's MRI pathology to be consistent with his complaints of pain. CX-9, p. 10. Dr. Piskun also rebutted Dr. McCaskill's assertion that Claimant's ability to perform physical tests was inconsistent with his condition. He testified that individuals with degenerative disc disease are frequently able to perform physically in such limited, single examination settings. RX-9, p. 13-15. The Court finds Dr. Piskun's testimony on the issue of causation to be credible and more logical than Dr. McCaskill's conclusions. Additionally, Dr. Piskun treated Claimant over the course of several months, as compared to Dr. McCaskill's single examination. Lastly, the Court found Claimant to be an honest and truthful witness, and his testimony of an onset of pain within a short time of the accident supports Dr. Piskun's conclusion that the condition was caused, at least in part, by the motor vehicle accident. Accordingly, the Court finds that Claimant's injury was caused by his employment-related motor vehicle accident.

NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is

primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

In this case, the parties agreed that if Claimant was found to be disabled, he is not permanently disabled and his current claim is only for temporary disability benefits. JX-11. Therefore, the Court need not address the issue of permanency. With respect to the extent of disability, the Court finds that Claimant has successfully established a *prima facie* case of total disability because he has shown that he cannot currently return to his regular employment as a truck driver. Dr. Piskun testified that Claimant is unable to work as a truck driver due to the severe pain he experiences in sitting for a prolonged period of time. CX-9, p. 11. Claimant testified that he does not feel like he would be physically capable of driving a truck long distances, that he attempted driving his truck in December 2004 and ceased after eight miles, and that his narcotic pain medications preclude him from driving. TR 42, 85-86. Employer failed to submit evidence of suitable alternative employment and, hence, does not challenge Claimant's showing of total disability. Based on the foregoing, the Court finds that Claimant is temporarily totally disabled.

AVERAGE WEEKLY WAGE

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The §10(a) formula requires the finding of an average daily wage and can only be utilized if the record contains evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981); Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976).

The Court finds that § 10(a) cannot reasonably and fairly be applied to yield a wage that reflects Claimant's annual earning capacity at the time of his injury. Claimant's actual earnings in the 52 weeks prior to his August 30, 2004 employment-related motor vehicle accident entailed approximately three months as a heavy truck driver in Iraq and the remainder as a self-employed truck driver in the U.S. These two jobs varied greatly in nature and pay and cannot be considered similar employment for purposes of §10(a). Additionally, due to the nature of Claimant's self-employment, an average daily wage cannot be determined. Based on the foregoing, the Court finds that § 10(a) is inapplicable to this case.

Because Section 10(a) is not applicable, the Court will look to § 10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under § 10(a). See 33 U.S.C. § 910(b). In this instance, Claimant was a seven day-per-week employee, and §10(b) requires comparison with a five or six day-per-week employee. Accordingly, the Court finds that § 10(b) is also inapplicable to this case.

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to § 10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. § 910(c). In determining earning capacity under § 10(c), "the administrative law judge must make a fair and accurate assessment of the injured employee's earning capacity, the amount that the employee would have the potential and opportunity of earning absent the injury." Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26, 29 (CRT) (5th Cir. 1991). The claimant's actual earnings at the time of injury does not control the

administrative law judge's average weekly wage calculation under § 10(c), although it is a factor to consider. Id. An administrative law judge has significant discretion in determining the appropriate average wage, but must base the wage determination on adequate evidence in the record. See Staftex Staffing v. Director, OWCP, 237 F.3d 404, 406, 34 BRBS 44, 45 (CRT) (5th Cir. 2000); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981).

Claimant argues that his average weekly wage should be calculated on the basis of his actual earnings with Employer. He asserts that his heavy truck driver position in Iraq paid dramatically higher wages than those he earned in the U.S. as a self-employed truck driver and that these higher wages properly reflect his earning capacity at the time of his injury. Employer argues that the Court should average Claimant's earnings as a self-employed truck driver in 2003 and 2004 and the extrapolated annual earnings he would have made as a truck driver in Iraq to fairly calculate his average annual earnings.

The Court finds that Claimant's potential earning capacity at the time of his injury is best reflected by his actual earnings with Employer in Iraq. The Court relies on the Board's ruling in a similar case where the claimant received an increase in salary shortly before his injury. The Board stated, "[a] substantial increase in wages at the employment where he was injured would best adequately reflect claimant's earning potential at the time of his injury." Miranda v. Excavation Construction, Inc., 13 BRBS 882, 886 (1981). The Court agrees. Combining Claimant's earnings as a self-employed truck driver in the U.S. at a significantly lower rate than he earned at the time of his injury would be unfair. Particularly, in this instance, Claimant chose to forego his stateside employment and undertake a new venture in Iraq, with increased hours and within a danger zone, for the very reason that he was unable to earn sufficient income through his self-employment. Although Claimant signed a one-year contract with Employer, he verified that other employees renewed their contracts on a yearly basis and testified that he intended to work in Iraq for up to five years. For these reasons, the Court finds that Claimant's acceptance of the Iraq position signified a new, long-term potential wage-earning capacity. Based on § 10(c)'s mandate that the Court determine Claimant's potential earning capacity at the time of his injury, the Court will calculate Claimant's annual wage earning capacity on the basis of his actual earnings with Employer in Iraq.

The Court finds the following calculation to be a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury, under § 10(c). Claimant earned $27,881.80 during 15.5 weeks of employment, from May 26, 2004 through September 11, 2004, which averages to earnings of $1,798.83 per week. Accordingly, Claimant's annual wage earning capacity was $93,539.16. Dividing $93,539.16 by 52 weeks, pursuant to § 10(d), yields an average weekly wage of $1,798.83. The Court finds that this figure fairly represents a calculation of Claimant's average weekly wage at the time of his work injury and that it is acceptable under § 10(c), a section under which the Court has wide discretion.

Pursuant to §906(b)(1), however, Claimant's compensation may not exceed the maximum compensation rate, which is 200 percent of the applicable national average weekly wage at the time of injury. On August 30, 2004, the maximum compensation rate was $1,030.78. United States Dept. of Labor, Employment Standards Administration (January 17, 2006). As Claimant's compensation based on the average weekly wage of $1,798.83 would be greater than this maximum compensation rate, Claimant is entitled to compensation at the rate of $1030.78 per week.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses that are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

The Court finds that Employer is liable for all past and future compensable medical benefits arising from Claimant's August 30, 2004 injury, including all recommendations made by Claimant's authorized treating physician, Dr. Piskun.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993). In awarding a fee, the administrative law judge must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132; Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

Employer paid Claimant compensation benefits at the rate of $800.00 per week for the 49 week period from September 11, 2004 through August 19, 2005. See JX-9. In this case, Claimant has succeeded in obtaining greater compensation than that paid by Employer. Therefore, the Court finds that Employer is liable for Claimant's attorney fees.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer/Carrier shall pay to Claimant compensation for temporary total disability from September 11, 2004 and continuing, based on the maximum compensation rate of $1030.78.

2) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

4) Employer/Carrier shall pay Claimant for all reasonable and necessary past and future medical expenses that are the result of Claimant's August 30, 2004 employment-related injury, including the corrective fusion surgery recommended by Dr. Piskun.

5) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

6) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

A

RICHARD D. MILLS
Administrative Law Judge